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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOSE FRANCISCO OROZCO, Defendant and Appellant.	B284024 (Los Angeles County Super. Ct. No. MA067230)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles (Carlos) Chung, Judge. Affirmed as modified.

Alan S. Yockelson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Nikhil D. Cooper, Deputy Attorneys General, for Plaintiff and Respondent.

Jose Francisco Orozco appeals from a judgment entered after a jury found him guilty of the following offenses he committed while incarcerated after his arrest for crimes unrelated to this case: assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4)),[1] battery with injury on a peace officer (§ 243, subd. (c)(2)), attempted escape by force or violence (§ 4532, subd. (b)(2)), misdemeanor violation of civil rights (§ 422.6, subd. (a)), and battery of a non-inmate by a jail inmate (§ 4131.5). The jury also found true the special allegation that, in the commission of the assault, battery, and escape attempt offenses, Orozco inflicted great bodily injury on a deputy sheriff. (§ 12022.7, subd. (a).) The trial court sentenced him to seven years eight months in prison.

Orozco contends he is entitled to a new trial because the trial court admitted into evidence incriminating statements he made to sheriff's deputies while in jail that violated his *Miranda* rights. (*Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).) We disagree with his contention and affirm the judgment (as modified to correct clerical errors in omitting restitution and parole revocation fines).

BACKGROUND

402 Hearing

On January 24, 2017, the trial court held a pretrial hearing pursuant to Evidence Code section 402 to decide the admissibility of statements Orozco made to sheriff's deputies during an interview conducted at Twin Towers Correctional Facility (the

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[1] Statutory references are to the Penal Code unless otherwise indicated.

facility). At the hearing, deputy sheriff Manskar testified to the following facts.

On October 7, 2015, Orozco was housed at the facility (after an arrest for crimes unrelated to this case). Manskar and another deputy, both detectives assigned to the jail investigations unit, went to the facility to interview Orozco regarding two incidents: a September 3, 2015 verbal and physical attack on another inmate[2] and a September 18, 2015 assault and battery on deputy sheriff Daniel Delrio.[3] The detectives, who worked out of another location, were in uniform but were unarmed during the interview.

Manskar asked deputies who worked at the facility to bring Orozco to the "deputy staging area," a secure area located on the floor where Orozco was housed. The U-shaped staging area where Manskar conducted the interview was approximately 20

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[2] Orozco's conviction in this case for misdemeanor violation of civil rights arose from this September 3, 2015 incident, during which Orozco hurled racial epithets at an African-American inmate and punched the same inmate in the back of the head. The inmate testified at trial, and the prosecutor played a video of the incident, which occurred inside a cell at a courthouse in Lancaster.

[3] Orozco's convictions in this case for assault by means of force likely to produce great bodily injury, battery with injury on a peace officer, and attempted escape by force or violence arose from this September 18, 2015 incident, during which Orozco punched Delrio in the face (causing injuries requiring nasal surgery), fled his cell at the Lancaster courthouse, and ran down a hallway, before being apprehended by other deputies. Delrio and another deputy testified at trial, and the prosecutor played a video of deputies attempting to restrain Orozco after he fled.

feet by 40 feet and overlooked the inmate dorms. The deputies led Orozco into the staging area through a door that connected to one of the inmate dorms. Manskar did not know what the deputies said to Orozco when they approached him and brought him to the staging area. Orozco arrived, wearing "a suicide gown" and handcuffs. Manskar did not remove the handcuffs. He testified at the hearing that, "For inmates wearing the suicide gowns they are typically kept in handcuffs to prevent them from hurting themselves. So they are kept in handcuffs the entire time." Manskar did not recall if any of the multiple doors leading into the staging area from the inmate dorms were open during the interview. Other deputies were milling about inside the staging area, but there were no other inmates there at the time of the interview.

At the hearing, the prosecutor played audio from the relevant portion of the interview and provided a transcript. The recording begins with Manskar stating for the record: "All right, today is October 7, Wednesday at 12:11 hours. I'll be interviewing inmate Orozco . . . regarding an assault on a deputy. I'm at Twin Towers facility." Next, the recording captured Orozco, saying, "refused but he said I couldn't" (presumably part of a statement he was making as he walked into the staging area). Manskar testified he did not recall Orozco making such a statement until he heard the audio at the hearing. Manskar explained Orozco was speaking to one of the deputies who brought him to the staging area; he was not addressing Manskar, who had not yet introduced himself or spoken to Orozco. Therefore, Manskar testified he did not know the context of Orozco's statement. The recording continues with Manskar

saying to Orozco, "OK, I'll talk to you real quick. Have a seat." Orozco sat.

The following brief exchange occurred before Manskar read Orozco his *Miranda* rights:

"I'm Detective Manskar, from the jail investigations unit. Um, I'm here regarding an incident that happened over at AV [Antelope Valley] court, do you know what I'm, talking about?

"[Orozco]: Yeah, yeah.

"[Detective Manskar]: What happened?

"[Orozco]: Man, I punched him in the nose.

"[Detective Manskar]: OK, before we go any further, I'm going to read you something, OK?"

Manskar then read Orozco his *Miranda* rights, and Orozco stated he understood his rights. Manskar asked, "OK, do you want to tell me what happened there? And why, why this happened?" Orozco explained that, on September 18, 2015, he was in his cell at the courthouse in Lancaster, planning an escape attempt. He requested medical attention after he injured his fingers when they were caught in the cell door as it closed. He decided he would assault any deputy who responded to his request for aid, take the deputy's keys, and flee through a door leading outside the facility. He punched the deputy (Delrio) in the nose.

The untranscribed portion of the recording lasted for another five minutes, during which Orozco discussed the September 3, 2015 attack on an inmate. The recording of that portion of the interview was not played at the hearing. According to Manskar, at no point during the entire 10-minute interview did Orozco indicate he wanted to end the conversation. Manskar did not tell Orozco he was free to leave and return to his cell.

At the hearing, Manskar testified there were two reasons he asked Orozco "what happened" before he read him his *Miranda* rights: "To see, one, if he would speak with me and, two, to see which incident he was going to talk about first." Manskar stated he planned to begin questioning Orozco about whichever incident Orozco brought up first, but hoped Orozco would speak to him about both incidents. Manskar explained, once Orozco said, "Man, I punched him in the nose," Manskar "knew exactly what case he was going to speak about" and "wanted to Mirandize him" before he asked "any further questions about that case."

After Manskar testified, defense counsel argued "Orozco was in custody" during the interview, "so the pre-*Miranda* statements are in violation of *Miranda*." Defense counsel also argued Orozco's statements after the *Miranda* warnings are inadmissible, indicating Manskar deliberately circumvented *Miranda* by asking "what happened" before reading Orozco his *Miranda* rights.

The trial court found no violation of Orozco's *Miranda* rights and ruled the statements were admissible. The court listed the following factors in support of its conclusion Orozco was not "in custody" for *Miranda* purposes: (1) Manskar was a member of the jail investigations unit, not an outside law enforcement agency, and he was questioning Orozco about incidents that occurred while Orozco was in jail custody, not incidents that occurred before he was incarcerated; (2) Orozco was interviewed in "a large open space" in "physical surroundings [that were not] unduly coercive," where "his freedom of movement" was not "restricted past the ordinary degree that he would normally be subject to while in custody"; (3) Manskar's

"conversational tone" and "innocuous" foundational question were not designed to "lead to an incriminating statement"; and (4) Manskar did not confront Orozco with evidence of guilt.

The trial court assumed Orozco was "forced to go into the interview setting," based on Orozco's statement on the recording, "refused but he said I couldn't." The court acknowledged this factor "cut in favor of him being in custody." The court also noted Orozco "was not told he was free to leave, nor was he told that he had to stay," so that factor did not cut either way in determining whether Orozco was in custody for *Miranda* purposes.

The trial court also concluded Manskar did not "tr[y] to do an end run around *Miranda*," in that he read Orozco his rights as soon as Orozco said, "Man, I punched him in the nose," rather than asking further questions to elicit additional details about the incident before giving *Miranda* warnings.

Trial

After the October 7, 2015 interview, Orozco was charged with offenses arising from the September 3 and 18, 2015 incidents, as outlined above.[4]

Before trial, a charge of battery of a non-inmate by a jail inmate, brought in another case (BA440139), was consolidated into this case. Evidence presented at trial showed that on September 16, 2015, Orozco punched deputy sheriff Bryan Cramer on the jaw, after Cramer escorted Orozco to his cell at Twin Towers Correctional Facility and was opening the door. Orozco fled and was tackled and restrained by Cramer and other

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[4] Evidence presented at trial supporting these charges is summarized above in footnotes 2 and 3.

deputies. Cramer testified at trial, and the prosecutor played for the jury a video of the attack.

Manskar testified at trial. The prosecutor played an audio recording of Manskar's October 7, 2015 interview with Orozco, and the trial court admitted into evidence a transcript of the recording. The recording played for the jury begins with Manskar introducing himself to Orozco, followed immediately by the *Miranda* advisement, omitting the statements Orozco made before Manskar read him his *Miranda* rights. This recording included Orozco's statements about the September 3, 2015 attack on another inmate, including that he assaulted the African-American inmate because he disliked and was "very prejudiced" against "Black people."

Orozco testified in his defense, admitting he punched the other inmate as well as deputies Cramer and Delrio. He also admitted he targeted the inmate because he was African-American and punched Delrio because he wanted to escape. Orozco stated, at the time he committed these acts, he was hearing voices due to marijuana-induced schizophrenia.

Orozco further testified he was truthful during the October 7, 2015 interview with Manskar and was no longer hearing voices at that time.

The jury's verdicts and the trial court's sentence are set forth above.

DISCUSSION

Admissibility of Orozco's Statements

Orozco contends he is entitled to a new trial because his statements to Manskar "were obtained in violation of *Miranda*," and the trial court erred in declining to suppress them.

Orozco's first argument in support of this contention is that the trial court should have ruled his prewarning statement ("Man, I punched him in the nose") was inadmissible because he was in custody for *Miranda* purposes and was entitled to *Miranda* warnings at the outset of the interview. (*Miranda*, *supra*, 384 U.S. at p. 444 ["the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination"].) For purposes of evaluating whether an inmate is in custody in applying *Miranda*, courts look to "whether a reasonable person would believe there had been a restriction of his freedom over and above that in his normal prisoner setting." (*Cervantes v. Walker* (9th Cir. 1978) 589 F.2d 424, 428; *People v. Macklem* (2007) 149 Cal.App.4th 674, 687.) The prewarning statement was not admitted into evidence at trial (although the court ruled at the section 402 hearing that it was admissible.) The statements at issue—the ones admitted into evidence at trial—are those Orozco made *after* Manskar provided *Miranda* warnings. Thus, we need not determine whether Orozco was in custody when he made the prewarning statement. The required determination here is whether the postwarning statements were part of a two-step questioning technique that violated *Miranda* (i.e., deliberately ask questions which elicit incriminating statements, give *Miranda* warnings, then ask questions to elicit those same incriminating statements). (*Missouri v. Seibert* (2004) 542 U.S. 600, 621 (conc. opn. of Kennedy, J.) (*Seibert*) ["When an interrogator uses this deliberate, two-step strategy, predicated upon violating *Miranda* during an extended interview, postwarning statements that are

related to the substance of prewarning statements must be excluded absent specific, curative steps"].) Addressing this issue, Orozco argues the trial court should have ruled his postwarning statements were inadmissible because Manskar deliberately employed a two-step interrogation method to circumvent *Miranda*.

Applicable Law

"When police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled and that they be excluded from evidence at trial in the State's case in chief." (*Oregon v. Elstad* (1985) 470 U.S. 298, 317 (*Elstad*).)

In *Elstad*, the United States Supreme Court addressed the admissibility of confessions made subsequent to *Miranda* warnings given after a defendant made an incriminating statement. The Court explained, "where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary," "there is no warrant for presuming coercive effect." (*Elstad*, *supra*, 470 U.S. at p. 318.) "The relevant inquiry is whether, in fact, the second statement was also voluntarily made. As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements. The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative." (*Ibid*.) The Court held "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." (*Ibid*.)

In *Seibert*, *supra*, 542 U.S. 600, the United States Supreme Court again addressed the admissibility of confessions made after "midstream" *Miranda* warnings. (*Seibert*, at p. 604 (plur. opn. of Souter, J.) There, the officer testified at the suppression hearing "he made a 'conscious decision' to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught: question first, then give warnings, and then repeat the question 'until I get the answer that she's already provided once.' " (*Id*. at pp. 605-606.) After the defendant's arrest, the officer questioned her without *Miranda* warnings for 30-40 minutes, "squeezing her arm and repeating" an accusatory statement regarding her knowledge that her son and his friend had planned to kill a child in a house fire "to conceal the facts surrounding [another child]'s death" in the home (" 'Donald was also to die in his sleep' "). (*Seibert,* at pp. 604-605.) "After [the defendant] finally admitted she knew Donald was meant to die in the fire, she was given a 20-minute coffee and cigarette break." (*Id*. at p. 605.) Then the officer gave her *Miranda* warnings and questioned her again, "confront[ing] her with her prewarning statements." (*Seibert*, at p. 605.) The defendant admitted she knew Donald " 'was supposed to die in his sleep,' " and she was later "charged with first-degree murder for her role in Donald's death." (*Ibid*.) The trial court suppressed the defendant's prewarning statements but admitted her postwarning statements into evidence, and a jury convicted her of second degree murder. (*Id*. at p. 606.)

The Court in *Seibert* did not issue a majority opinion. Five justices agreed the defendant's postwarning statements were inadmissible. "Because Justice Kennedy 'concurred in the judgment[] on the narrowest grounds' [citation], his concurring opinion represents the *Seibert* holding." (*People v. Camino* (2010)

188 Cal.App.4th 1359, 1370.) Justice Kennedy concluded: "The admissibility of postwarning statements should continue to be governed by the principles of *Elstad* [*supra*] unless the deliberate two-step strategy was employed. If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made. Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver. For example, a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn. [Citation.] Alternatively, an additional warning that explains the likely inadmissibility of the prewarning custodial statement may be sufficient. No curative steps were taken in this case, however, so the postwarning statements are inadmissible and the conviction cannot stand." (*Seibert*, *supra*, 542 U.S. at p. 622 (conc. opn. of Kennedy, J.).)

" 'In reviewing constitutional claims of this nature, it is well established that we accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. We independently determine from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained.' " (*People v. Thomas* (2011) 51 Cal.4th 449, 476.)

The trial court's determination whether an officer employed a deliberate two-step strategy "is a factual finding entitled to

deference." (*People v. Camino*, *supra*, 188 Cal.App.4th at p. 1372.) We are bound by this factual determination if supported by substantial evidence. (*Ibid.*)

Analysis

Manskar testified at the section 402 hearing that he asked foundational questions to see if Orozco would talk to him, not to do an end-run around *Miranda*. The trial court found Manskar's testimony to be credible. Noting that Manskar read Orozco his rights as soon as Orozco said, "Man, I punched him in the nose," rather than asking further questions to elicit additional details about the incident before giving *Miranda* warnings, the trial court determined Manskar did not use a deliberate two-step strategy to circumvent *Miranda*. The trial court's determination is supported by substantial evidence and is entitled to deference on appeal.

Because we are bound by the trial court's determination that a deliberate two-step was not employed in this case, we need not address whether curative measures were taken before Orozco made his postwarning statements. (*Seibert*, *supra*, 542 U.S. at p. 622 (conc. opn. of Kennedy, J.) ["If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made"].) Instead, *Elstad* controls here. Thus, Orozco's postwarning statements are admissible in the absence of "actual coercion or other circumstances calculated to undermine [his] ability to exercise his free will." (*Elstad*, *supra*, 470 U.S. at p. 309.)

Based on our independent review from the undisputed facts and the facts properly found by the trial court, we conclude

Orozco's postwarning statements were voluntary and uncoerced. Orozco was not confronted with force or threats or evidence of his guilt during the interview. The trial court noted Manskar used a "conversational tone." He did not bully Orozco to get him to talk. Orozco chose to speak to Manskar after being informed of his rights, which is "highly probative" of the voluntariness of his statements. (*Elstad*, *supra*, 470 U.S. at p. 318.) He did not tell Manskar he did not want to talk or ask Manskar if he could leave the interview. He was interviewed for 10 minutes in a large, open room, where he could see out and others could see in. He was not shut away for a lengthy period of time in harsh conditions. The record does not demonstrate Orozco's postwarning statements were secured by "coercion or other circumstances calculated to undermine [his] ability to exercise his free will." (*Id.* at p. 309.)

Orozco notes he was in a suicide gown and handcuffs during the interview. The record demonstrates those were conditions of his confinement in jail, not conditions placed upon him for the interview. He also points to his partial statement captured on the recording indicating he was forced to meet with Manskar ("refused but he said I couldn't"). While this statement may tend to show he was in custody for *Miranda* purposes (an issue we need not reach here), it does not tend to show his postwarning statements were coerced or otherwise involuntary.

For the foregoing reasons, we conclude the trial court did not err in admitting Orozco's postwarning statements into evidence at trial.

Correction of Judgment to Reflect Fines Imposed

As the Attorney General pointed out in the respondent's brief, the trial court imposed a $6,000 restitution fine and

imposed and stayed a $6,000 parole revocation fine during the sentencing hearing on July 19, 2017. The abstract of judgment does not reflect these fines. In his reply brief, Orozco does not dispute the propriety of these fines or that this court may order the trial court to correct these clerical errors. (*People v. Mitchell* (2001) 26 Cal.4th 181, 187.) We order the trial court to do so.

DISPOSITION

The trial court is ordered to correct the judgment to reflect imposition of a $6,000 restitution fine and imposition of a $6,000 parole revocation fine stayed pending successful completion of parole. As so modified, the judgment is affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

BENDIX, J.

CURREY, J.*

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* Associate Justice of the Court of Appeal, Second Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.